Fadzil bin Awang Kechik v Menteri Sumber Manusia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–95–05 OF 2016
HANIPAH FARIKULLAH J
16 JUNE 2017

Civil Procedure — Judicial review — Application for — First respondent did not to refer applicant's presentation to Industrial Court — Whether Minister failed to appreciate and misinterpreted law that applicant's representation was premised on forced resignation which amounted to constructive dismissal — Whether applicant's representation perverse, frivolous and vexatious — Whether Minister failed to take into account all relevant facts

This was an application for judicial review to seek an order of certiorari and mandamus to quash the decision of the first respondent not to refer to the applicant's presentation to the Industrial Court and for the court to direct the matter be referred to the Industrial Court. The applicant submitted that the application should be allowed based on the following grounds: (a) the Minister misinterpreted the law by failing to appreciate that forced resignation was termination without just cause and excuse; (b) the Minister failed to appreciate and misinterpreted the law that the applicant's representation was premised on forced resignation which was a constructive dismissal and representation based on constructive dismissal had to be referred to the Industrial Court; (c) the applicant's representation was not perverse, frivolous nor vexatious; (d) there was substantial dispute of facts that had never been expressly denied by the second respondent and must be referred to the Industrial Court for adjudication; (e) there was significant failure to consider and examine material relevant facts and considering irrelevant facts; and (f) the retirement benefit payment of RM210,297.10 did not bar nor prohibit the applicant's representation to be referred to the Industrial Court. Hence, the issues for the court to determine were: (i) whether the Minister failed to appreciate and misinterpreted the law that the applicant's representation was premised on forced resignation which was a constructive dismissal; (ii) whether the applicant's representation was perverse, frivolous and vexatious; (iii) whether the Minister failed to take into account all relevant facts; and (iv) whether the retirement benefit payment of RM210,297.10 prohibited the applicant's representation to be referred to the Industrial Court.

Held, allowing the application with costs of RM5,000:

(1) The Minister had clearly overstepped his jurisdiction by making a finding to reject the plaintiff's representation on merits. Whether or not an

employee was constructively dismissed was a question of law which was not the province of the Minister to decide. The Industrial Court was the best venue to decide the question of whether the Minister failed to appreciate and misinterpreted the law that the applicant's representation was premised on forced resignation which was a constructive dismissal. The minister ought to have referred the respondent's representation to the Industrial Court to decide on its merits. Therefore, the Minister had failed to fully appreciate the scope of his discretion under s 20(3) of the Industrial Relations Act 1967, when he declined to refer to the Industrial Court (see paras 29–30).

(2) Based on an objective examination of the facts before the Minister, the material facts showed that the application was not perverse, frivolous or vexatious and that the disputed matters were also not within the purview of the Minister to decide. The Honorable Minister's affidavit showed that a reasonable person similarly circumstanced would not have arrived at the same decision as the Minister had acted. Further, the Minister's affidavit showed that there were facts not taken into account. The fact that the applicant accepted the compensation from the second respondent did not in any way prevent or bar him from seeking the remedy of reinstatement from the Industrial Court (see paras 31, 33–36 & 39).

(3) The first respondent should not have replaced the position of the Industrial Court to evaluate the merits of the representation but only to consider whether the representation was perverse, frivolous or vexatious. It was the Industrial Court and not the first respondent that was clothed with the jurisdiction and power to hear and adjudicate the reference and being a court of equity and good conscience, it was the appropriate forum to hear the evidence of all parties and make a fair and appropriate decision (see paras 40–41).

[Bahasa Malaysia summary

Ini adalah permohonan untuk semakan kehakiman untuk memohon perintah certiorari dan mandamus untuk membatalkan keputusan responden pertama untuk tidak merujuk kepada representasi pemohon kepada Mahkamah Perusahaan dan untuk mahkamah mengarah perkara dirujuk kepada Mahkamah Perusahaan. Pemohon berhujah bahawa permohonan patut dibenarkan berdasarkan alasan-alasan berikut: (a) Menteri salah tafsir undang-undang kerana gagal untuk menilai peletakan jawatan yang dipaksa adalah penamatan kerja tanpa sebab dan alasan; (b) Menteri gagal untuk menilai dan salah tafsir undang-undang bahawa representasi adalah berdasarkan atas peletakan jawatan yang dipaksa yang mana merupakan pembuangan kerja dan representasi berdasarkan pembuangan kerja konstruktif harus dirujuk kepada Mahkamah Perusahaan; (c) representasi pemohon tidak membantah, remeh atau menyusahkan; (d) terdapat pertikaian fakta yang substansial yang tidak pernah dinafikan secara nyata oleh responden

kedua dan mesti dirujuk kepada Mahkamah Perusahaan bagi penghakiman; (e) terdapat kegagalan yang penting untuk mempertimbangkan dan memeriksa fakta relevan material dan mempertimbangkan fakta tidak relevan; dan (f) bayaran faedah persaraan sebanyak RM210,297.10 tidak menyekat atau melarang representasi pemohon untuk dirujuk kepada Mahkamah Perusahaan. Maka, isu-isu untuk penentuan mahkamah adalah: (i) sama ada Menteri gagal untuk menilai dan salah tafsir undang-undang bahawa representasi pemohon adalah berdasarkan peletakan kerja yang dipaksa yang mana merupakan pembuangan kerja konstruktif; (ii) sama ada representasi pemohon adalah membantah, remeh dan menyusahkan; (iii) sama ada Menteri gagal untuk mengambil kira kesemua fakta relevan; dan (iv) sama ada bayaran faedah persaraan sebanyak RM210,297.10 melarang representasi pemohon tuntuk dirujuk kepada Mahkamah Perusahaan.

Diputuskan, membenarkan permohonan dengan kos sebanyak RM5,000:

(1) Menteri telah jelas membatasi bidang kuasanya dengan membuat dapatan untuk menolak representasi plaintif atas merit. Sama ada atau tidak seorang pekerja dibuang kerja secara konstruktif adalah persoalan undang-undang yang mana adalah bukan dalam skop untuk diputuskan oleh Menteri. Mahkamah Perusahaan adalah tempat yang bagus untuk memutuskan persoalan sama ada Menteri gagal untuk menilai dan salah tafsir undang-undang bahawa representasi pemohon adalah berdasarkan atas peletakan jawatan yang dipaksa yang mana merupakan pembuangan kerja konstruktif. Menteri patut merujuk representasi responden kepada Mahkamah Perusahaan untuk memutuskan atas merit. Oleh itu, Menteri telah gagal untuk menilai sepenuhnya skop budi bicaranya di bawah s 20(3) Akta Perhubungan Perusahaan 1967, apabila beliau menolak untuk merujuk kepada Mahkamah Perusahaan (lihat perenggan 29–30).

(2) Berdasarkan pemeriksaan objektif fakta di hadapan Menteri, fakta material menunjukkan bahawa permohoan tidak membantah, remeh atau menyusahkan dan perkara yang dipertikaikan juga adalah bukan dalam skop untuk diputuskan oleh Menteri. Afidavit Yang Berhormat Menteri menunjukkan bahawa orang yang munasabah yang dalam keadaan yang sama tidak akan mencapai kepada keputusan yang sama kerana Menteri telah bertindak. Selanjutnya, afidavit Menteri menunjukkan bahawa terdapat fakta yang tidak diambil kira. Fakta bahawa pemohon menerima pampasan daripada responden kedua tidak dalam apa-apa cara menghalang atau menyekatnya daripada memohon remedi pengembalian kedudukan jawatan daripada Mahkamah Perusahaan (lihat perenggan 31, 33–36 & 39).

(3) Responden pertama tidak patut menggantikan kedudukan Mahkamah Perusahaan untuk menilai merit representasi tetapi hanya untuk

mempertimbangkan sama ada representasi adalah membantah, remeh atau menyusahkan. Ia adalah Mahkamah Perusahaan dan bukan responden pertama yang diberikan dengan bidang kuasa dan kuasa untuk mendengar dan menghakimi rujukan tersebut dan sebagai mahkamah ekuiti dan hati nurani yang baik, ia adalah forum yang sesuai untuk mendengar keterangan kesemua pihak dan membuat keputusan yang adil dan wajar (lihat perenggan 40–41).]

Notes

For cases on application for judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5937–5949.

Cases referred to

Harpers Trading (M) Sdn Bhd lwn Lee Fook Kiong dan lain-lain [2006] 2 MLJ 443, CA (refd)

James Clement Hii Gin Kion v Menteri Sumber Manusia & Anor [2015] MLJU 2011; [2015] 3 CLJ 234, HC (refd)

Minister For Human Resources v Thong Chin Yoong and another appeal [1999] 3 MLJ 257, CA (folld)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)

Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba [1998] 2 MLJ 372, CA (refd)

Zainon Ahmad & Ors v Padiberas Nasional Bhd [2012] 8 CLJ 29, FC (refd)

Legislation referred to

Industrial Relations Act 1963 ss 20, 20(3)

Harjinder Singh (Premjit Singh with him) (Prem & Assoc) for the applicant.
Mohd Farid bin Mohd Mokhtar (Federal Counsel, Attorney General's Chambers) for the first respondent.
Rutheran Sivagnanam (The Chambers of R Sivagnanam & Assoc) for the second respondent.

Hanipah Farikullah J:

INTRODUCTION

[1] The applicant's who is aggrieved with the decision of the first respondent is commencing this action for judicial review among others to seek an order of certiorari and mandamus to quash the decision of the first respondent vide the letter dated 20 January 2016 not to refer the applicant's presentation to the Industrial Court and for this court to direct the matter be referred to the Industrial Court.

THE APPLICANT'S CASE

[2] The facts leading to this application are as follows.

[3] The applicant had commenced his employment with the second respondent on 21 April 1986 and when the predecessor Lembaga Padi and Beras Negara ('LPN') was privatised on 5 June 1994, the applicant accepted the offer to continue his employment with the second respondent.

[4] The application before his termination was employed as Manager Bernas Careline and at the material time was employed nearly 29 years with the second respondent.

[5] On the 26 March 2015, the applicant alleged that he was forced to resign as the Manager of the Bernas Careline by being forced to accept optional retirement by his superiors.

[6] The applicant contended that his superiors had exerted extreme pressure on the applicant by continuously asserting and alluding that the applicant would be dismissed from his employment.

[7] The applicant asserted that before Mr Rosli Shariff, Pengurus Besar Kanan, Jabatan Modal Insan dan Pentadbiran had commenced his employment with the second respondent and as the superior of the applicant (February 2015), he had a good employment record with the second respondent.

[8] After Mr Rosli Shariff has taken over supervision of his department the applicant had been placed under enormous and considerable stress wherein the applicant had been consistently questioned on his work performance without any basis and was subjected to psychological pressure by numerous allegation, comments and accusation made by Mr Rosli Shariff and Mr Ghaus bin Omar.

[9] The consistent mental and psychological pressure placed on the applicant made the applicant consistently doubt himself and placed him in deep fear of losing job without the benefits due to him from his long employment with the respondent.

[10] The applicant was victimised by the action of his superiors and had his livelihood threatened as they had pressured him that he would either be dismissed summarily or subjected to disciplinary action with eventual dismissal.

A **[11]** The applicant was then instructed to be referred to the Head of Internal Audit, Ms Normala Hassan to conduct an audit on the work performance and quality of the applicant's work.

B **[12]** However after the audit was concluded he was informed by Ms Normala Hassan that his job performance is satisfactory.

[13] Further, the applicant contended that the victimisation and the continuous threats and allegation against the applicant did not stop and all his C decision were repeatedly questioned by his superiors and placed under enormous stress by both Mr Rosli Shariff and Mr Ghaus bin Omar.

[14] Thus the applicant said he could no longer bear the pressure and applied for a transfer to a different department in Port Klang and had managed D to obtain the support of the head of the department.

[15] However his request for transfer was denied by his superior and Mr Rosli Sharif had then asked him to resign on 26 March 2015.

E **[16]** He was then offered an alternative by Mr Ghaus bin Omar that he should apply for his optional retirement which he was entitled by virtue of his employment contract and with his long service.

F **[17]** He was told that he had to take this option as he could no longer continue his employment and disciplinary proceeding will be instituted against him and he will be dismissed from the company and lose all his retirement benefits.

G **[18]** The applicant then had no other option in view of the cumulative pressure placed on him and the fear of losing his job without his entitlement as he would not be able to support his family.

[19] Thus he had no option but to give his letter for resignation applying for H optional retirement with three months notice.

[20] This however was rejected by Mr Rosli Shariff who had said that 'why would they want to keep him for another three months'?

I **[21]** Thus, he was forced to prepare another letter requesting for immediate termination on 27 March 2015 with his last date being on 31 March 2015 which is after four days.

[22] The applicant subsequently then wrote to the second respondent

highlighting the action of his superiors Mr Rosli Shariff and Mr Ghaus bin Omar and requested for reinstatement and was willing to return the retirement benefit payment of RM210,279.10 received if reinstated which was rejected by the second respondent.

[23] The applicant then made his representation to the Industrial Relation Department and however the Minister on 20 January 2016 had decided that the matter should not be referred to the Industrial Court.

[24] The applicant submitted that the application should be allowed based on the following grounds:

(a) the Minister misinterpreted the law by failing to appreciate that forced resignation is a termination without just cause and excuse;

(b) the Minister fail to appreciate and misinterpreted the law that the applicant's representation is premised on forced resignation which is a constructive dismissal and representation based on constructive dismissal has to be referred to the Industrial Court as per the Court of Appeal decision in *Minister For Human Resources v Thong Chin Yoong and another appeal* [1999] 3 MLJ 257 and *Harpers Trading (M) Sdn Bhd lwn Lee Fook Kiong dan lain-lain* [2006] 2 MLJ 443;

(c) the applicant's representation is not perverse, frivolous nor vexatious;

(d) there is substantial dispute of facts that has never been expressly denied by the second respondent and must be referred to the Industrial Court for adjudication;

(e) significant failure to consider and examine material relevant facts and considering irrelevant facts; and

(f) that the retirement benefit payment of RM210,297.10 does not bar nor prohibit the applicant's representation to be referred to the Industrial Court.

ISSUE

[25] This case involves a challenge by the applicant to the decision of the Minister on the following grounds:

(a) whether the Minister failed to appreciate and misinterpreted the law that the applicant's representation is premised on forced resignation which is a constructive dismissal;

(b) whether the applicant's representation is perverse, frivolous nor vexatious;

(c) whether the Minister failed to take into account all relevant facts; and

(d) whether the retirement benefit payment of RM210,297.10 prohibit the applicant's representation to be referred to the Industrial Court.

Whether the Minister failed to appreciate and misinterpreted the law that the applicant's representation is premised on forced resignation which is a constructive dismissal

[26] The Honorable Minister in his affidavit in reply, inter alia, averred the following:

> Saya mendapati tiada unsur-unsur paksaan untuk Pemohon berhenti kerja, sebaliknya saya mendapati Pemohon telah membuat Permohonan untuk bersara awal/pilihan dengan menghantar 2 surat.

[27] The second respondent submitted that the Minister had duly considered all the relevant facts and the reasons advanced and/or relied by the parties declined a reference of the applicant's representation to the Industrial Court on the basis that it was 'not fit'. In doing so he had acted within his discretion and in accordance with the Industrial Relations Act 1967, wherein the threshold jurisdiction of the Minister under s 20 only arises when there is a 'dismissal' only.

[28] It was contended for the respondents that in the present case, the applicant left the second respondent on early retirement. In support of the second respondent's contention, learned counsel relied on the Federal Court's case in *Zainon Ahmad & Ors v Padiberas Nasional Bhd* [2012] 8 CLJ 29 where it was held as follows:

> [15] We are inclined to express the same view. More so in the present case since the undisputed fact shows that the plaintiffs had exercised their option under the VSS and accepted the amounts payable thereunder. As such the contention of the plaintiffs that they are entitled not only to receive the termination benefits under the VSS but also the termination benefits under cl 5.5 of the 'Buku Panduan' is obviously misplaced. We are of the view that the VSS scheme is a separate and independent contract intended to mutually override and terminate an existing contract of employment. The two contracts do not co-exist. Otherwise the very objective of VSS as adumbrated in AK Bindal is defeated. A contract which is rescinded by agreement is completely discharged and cannot be revived. It is certainly not intended that after the employee leaves under the VSS, the employee can still return to ask for other benefits under the terms of his contract of employment. Thus, we find the plaintiffs contention that the termination benefits are still intact and ongoing after such rescission, with respect, is misconstrued.
>
> ...
>
> [18] It is our view that under VSS the employees have the option to accept the said scheme or continues to work as before. Therefore, once the said option has been exercised by the employees, the question of it being unfair does not arise. To us an

employee who on his own will, accepts the benefits of the VSS, resigns, signs a full and final settlement and walks away cannot then turn around and ask for any other benefits.

[29] In my view, with respect this ground alone is sufficient to allow this application as the Minister has clearly overstepped his jurisdiction by making a finding to reject the plaintiff's representation on merits.

[30] In my view, whether or not an employee was constructively dismissed is a question of law which is not the province of the Minister to decide. The Industrial Court is the best venue to decide this question. In the proper exercise of his discretion, the Minister ought to have referred the respondent's representation to the Industrial Court to decide on its merits. Therefore, the Minister had failed to fully appreciate the scope of his discretion under s 20(3) of the Act, when he declined to refer to the Industrial Court (*Minister For Human Resources v Thong Chin Yoong and another appeal* [1999] 3 MLJ 257 followed).

Whether the applicant's representation is perverse, frivolous nor vexatious

[31] Learned counsel for the applicant submitted that the applicant's representation is nor perverse, frivolous nor vexatious and therefore the Honorable Minister ought to have refused the dispute to the Industrial Court. In my view the following material facts shows that the application is not perverse, frivolous nor vexatious:

(a) the applicant was employed with the second respondent a total of 29 years;

(b) there is no dispute prior to the incidents of 2015 (Rosli Shariff commenced employment as his superior in February 2015), the applicant has dutifully and diligently discharged his duties as the second respondent's employee;

(c) there is no dispute that Rosli Shariff and Ghaus bin Omar were his superiors;

(d) there is no affidavit in reply by any Rosli Shariff or Gahus bin Omar to dispute all the allegation of pressure and coercion by them. In *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 the court held that:

> In evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

(e) that the application on 19 March 2015 had applied for a transfer out of

A the department as the manager of Bernas Careline which was denied.
– This was never specifically denied by the second respondent;

(f) that after one week on 26 March 2015, he was tendered the letter of resignation by applying for optional retirement by giving three months notice.

B – The applicant after his transfer being rejected was told by Mr Ghaus bin Omar that he should resign by applying for optional retirement which he was entitled by virtue of his employment contract and with his long service and he had to take this option as Mr Ghaus bin Omar and

C Rosli Shariff had told him that he could no longer continue his employment and disciplinary proceeding will be instituted against him and that he would be dismissed from the company and lose all his retirement benefits;

D (g) it is undisputed by all parties that the application's notice period for resignation is three months;

(h) the next day 27 March 2015, the applicant tendered a fresh letter of resignation by applying for optional retirement with four days notice on 31 March 2015.

E – The applicant have posed and challenged the second respondents whether it normal procedure not even acceptable for the applicant to resign by way of optional retirement within four days notice but the second respondent have failed/refused to answer the challenge posed; and

F (i) the application for optional retirement was immediately approved.
– The applicant have posed and challenged the second respondents whether it is possible for optional retirement be approved so expeditiously but the second respondent have failed/refused to answer

G the challenge posed.

[32] It must be stressed that the above material fact shows that there is a dispute on the question of fact whether the applicant resigned voluntarily or it was a forced resignation.

H

[33] These disputed matters are certainly not frivolous and vexatious and are not within the purview of the Minister to decide.

[34] Upon an objective examination of the facts before the Minister, I find

I that the Honorable Minister's affidavit shows that a reasonable person similarly circumstanced would not have arrived at the same decision as the Minister had acted based on the facts.

Whether the Minister failed to take into account all relevant facts

[35] The affidavit of the Minister shows that the following facts were not taken into account:

(a) that the application on 19 March 2015 (one week prior) had applied for a transfer out of the department as the manager of Bernas Careline which was denied;

(b) that the applicant was subjected to internal audit with Puan Normala Hassan of Bernas Internal Audit and was informed that there was no problem with his employment and cleared from any allegation of wrongdoing; and

(c) that there were two letters of resignation within twenty four hours which clearly shows the resignation was coerced and forced to terminate his employment within four days after 29 years of service.

Whether the retirement benefit payment of RM210,297.10 prohibit the applicant's representation to be referred to the Industrial Court

[36] The first respondent's affidavit in reply shows that the first respondent was heavily influenced by the issue of retirement benefits paid as a pertinent factor in not referring the representation.

[37] In the case of *James Clement Hii Gin Kion v Menteri Sumber Manusia & Anor* [2015] MLJU 2011; [2015] 3 CLJ 234, the court held as follows:

> (1) It is the duty of the Industrial Court in a reference under s 20 of the IRA to determine whether or not, firstly, there was a termination and secondly, if so, whether the termination was for just cause and excuse. Therefore, the question of whether or not the applicant was justified in refusing to accept the PIP which eventually led to the compensation package being paid to him in return for him leaving the employment of the second respondent and the concomitant question of whether under those circumstances there was a termination of employment as contended by the applicant were matters within the sole competence of the Industrial Court. It was not for the first respondent to delve into the merits of the case in order to determine the matter.
>
> (3) The fact that the Industrial Court chooses not to grant reinstatement but compensation in appropriate cases does not detract from the fact that the primary remedy is reinstatement. Should the Industrial Court eventually find that the termination was without just cause or excuse, being a court enjoined to act according to equity and good conscience, in assessing any compensation due to the applicant, without doubt will have due regard to any monies paid and the appropriate deduction would be made for the compensation already received. Therefore, the fact that the applicant accepted the compensation from the second

respondent does not in any way prevent or bar him from seeking the remedy of reinstatement from the Industrial Court.

[38] The Court of Appeal in *Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba* [1998] 2 MLJ 372 which had the same facts and a forced resignation scenario, held that the fact that the applicant has accepted compensation and by applying the principle of estoppels, cannot be used to defeat his claim.

[39] In the light of the principles cited above, I am of the view that the fact that the applicant accepted the compensation from the second respondent does not in any way prevent or bar him from seeking the remedy of reinstatement from the Industrial Court.

CONCLUSION

[40] In conclusion, the first respondent should not replace the position of the Industrial Court to evaluate the merits of the representation but only to consider whether the representation is perverse, frivolous or vexatious.

[41] The Industrial Court not the first respondent is clothed with the jurisdiction and power to hear and adjudicate the reference and being a court of equity and good conscience is the appropriate forum to hear the evidence of all the parties and make a fair and appropriate decision.

[42] Accordingly, the application is allowed with costs of RM5,000.

Application allowed with costs of RM5,000.

Reported by Nisha Paran